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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. NOE ORTEGA, Defendant and Appellant.	B203367 (Los Angeles County Superior Ct. No. BA316481)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig E. Veals, Judge. Affirmed.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jason Tran and Dana M. Ali, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Noe Ortega appeals from the judgment entered following a jury trial in which he was convicted of attempted voluntary manslaughter and assault with a firearm. Appellant contends the trial court erred by refusing his request for an accident defense instruction, and his attorney rendered ineffective assistance. We affirm.

FACTS

On December 23, 2006, Manuel Gonzalez's family held a party at their home. Appellant and Anthony Lupercio, who were Gonzalez's cousins, attended the party. Gonzalez and Lupercio told the police that Gonzalez "picked on" appellant and the two men argued throughout the day. In the early evening, appellant, Gonzalez, and Lupercio went into the converted garage Gonzalez used as a bedroom. The argument became more heated and personal. Lupercio left the room because he felt something was going to happen. Appellant became very angry, drew a gun, and fired a single shot at Gonzalez's chest from a distance of about five feet.

At trial, Gonzalez and Lupercio repudiated their statements to the police. They both denied that any argument occurred and claimed to be extremely inebriated. Both also testified that appellant was drinking and appeared to be intoxicated. Lupercio added that he and appellant drank and smoked marijuana before they arrived at the party. Gonzalez testified he did not know how he got shot or who shot him. He explained that he could not see well in the dimly lit room. Both Gonzalez and Lupercio testified that only appellant and Gonzalez were in the room at the time of the shooting. Gonzalez testified he thought the shooting must have been an accident because he could not think of any reason for anyone to shoot him. Gonzalez admitted he had a close familial relationship to appellant, whom he also believed to be a gang member. Gonzalez denied that he feared appellant.

Maria Becerra, who was also a cousin to appellant, Gonzalez and Lupercio, heard the shot and saw appellant emerge from Gonzalez's room. Appellant said, "That's what you get" or "That's what happens," then walked through a gate into the alley. Lupercio came out of Gonzalez's room as appellant re-entered the yard. Lupercio told appellant to leave, and appellant left. Both Lupercio and appellant appeared to be worried. Gonzalez then stepped out, holding his chest and pleading for help.

Gonzalez told a clinical social worker who visited him in the hospital that appellant shot him without provocation. Appellant's sister, Maria Ortega, testified that Gonzalez told her that appellant shot him, but he said it was an accident.

The deputy and detective who interviewed Lupercio testified that he did not appear to be intoxicated when they spoke to him in the immediate aftermath of the shooting. When Gonzalez spoke to the detective at the hospital, he did not say that his ability to see who shot him was impaired by intoxication or dim lighting. He also did not say he thought the shooting was an accident.

Appellant did not testify.

The jury convicted appellant of attempted voluntary manslaughter, as a lesser included offense of attempted murder, and assault with a firearm. The jury found, with respect to each count, that appellant personally used a firearm and personally inflicted great bodily injury in the commission of the offenses. The court found appellant served a prior prison term within the scope of Penal Code section 667.5, subdivision (b).[1] The court sentenced appellant to 17 years in prison.

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[1] Unless otherwise noted, all unspecified statutory references pertain to the Penal Code.

DISCUSSION

1. Accident instruction

Appellant asked the trial court to instruct the jury with CALJIC No. 4.45, which pertains to the defense of accident or misfortune. The court refused the request on the ground that Gonzalez's testimony was insufficient to support the instruction. Appellant contends the refusal was error and violated his right to present a defense. He cites as support for the accident instruction Gonzalez's testimony and out-of-court statements to the effect the shooting was an accident, his own intoxication, and "the lack of specifics as to how appellant procured or handled the revolver before the shot was fired."

No crime is committed by a person who commits the act charged through misfortune or by accident, "when it appears that there was no evil design, intention, or culpable negligence." (§ 26.) An accident defense is based upon a claim defendant acted without the requisite mental state. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 390.)

A trial court must give a requested instruction only if it is supported by substantial evidence, i.e., evidence sufficient to deserve jury consideration. (*People v. Marshall* (1997) 15 Cal.4th 1, 39.) It need not instruct on matters for which the evidence is minimal and insubstantial. (*People v. Flannel* (1979) 25 Cal.3d 668, 684 (*Flannel*) overruled on other grounds by *In re Christian S.* (1994) 7 Cal.4th 768.) In deciding that evidence is substantial enough to require an instruction, the court determines only its bare legal sufficiency, not its weight. (*Flannel*, *supra*, 25 Cal.3d at p. 684.)

The record reveals insufficient evidence to support an accident instruction. The only evidence describing how the shooting occurred indicated it was intentional. Gonzalez told a sheriff's deputy at the hospital shortly after the shooting that he had been "picking on" appellant and arguing with him all day. Appellant grew very angry, drew a gun, and shot Gonzalez from a distance of about five feet. Lupercio also told Detective Torres that Gonzalez had been "picking on" appellant, and as the evening progressed, the

argument between the two became more serious and more personal. The bickering became so intense, Lupercio believed something was about to happen, so he stepped outside of Gonzalez's room immediately before the shooting. Nor did Gonzalez's trial testimony support an accident claim, as he insisted he knew neither who shot him nor how the shooting came about. He admitted that his subsequent conclusory statements regarding an accident were based solely upon his belief that no one had a motive to shoot him, and therefore an accident was the only plausible explanation. Gonzalez's accident conclusion was, at best, speculation. Moreover, his accident conclusion contradicted his earlier statements and those of Lupercio and Becerra regarding their observations immediately before and after the shooting, respectively. Absent any non-speculative, fact-based support for an accident defense, the trial court did not err by refusing the requested instruction. For the same reason, the absence of an accident instruction did not deprive appellant of his right to present a defense.

Appellant's reliance upon his voluntary intoxication as proof of accident is misplaced. The two concepts are distinct. Appellant's intoxication neither constitutes nor substitutes for evidence that the firing of the gun was accidental. Moreover, the trial court instructed the jury on the potential effect of voluntary intoxication upon the existence of the required specific intent.

Appellant's contention regarding the absence of evidence of details, such as where he "procured" the gun and how he handled it, is similarly insufficient to demonstrate error. The evidence showed appellant had a gun, pointed it at Gonzalez, and fired. The prosecution was not required to establish additional details to prove an intentional shooting, and the absence of such details has no tendency to show that the shooting was accidental.

2. Ineffective assistance of counsel

The prosecutor introduced certified abstracts of judgment showing that appellant was convicted in August 2005 of possessing a concealed firearm and in February 2006 of being a felon in possession of a firearm. He received concurrent prison terms for these convictions. The Information cited both of these convictions in support of a section 667.5, subdivision (b) prior prison term enhancement allegation.

At the sentencing hearing, the court repeatedly and strongly proclaimed its view that appellant's crime was more egregious than reflected in the verdict. In response to defense counsel's reference to the crime as involving a single shot, the court responded, "The shot in the chest . . . which fortuitously didn't result in murder." The court reemphasized the point by remarking that the shot was "to the chest. . . . [H]ow he survived it's just nothing short of a miracle."

The court continued by expressing its analysis and opinion of the verdict: "Let me say one other thing and that is that you pointed out a few factors that the jurors might have considered in justifying less than a murder conviction in this case. I think overwhelmingly the reason for it actually was that there was a rather heated argument that proceeded [*sic*] the shooting. And the jury gave him every benefit of the doubt as a result of that. [¶] And quite frankly I thought it was a case that justified overwhelmingly a conviction for attempted murder. And he's very fortunate that he wasn't convicted of that. [¶] So you get some way of the court's leaning as far as what is the appropriate sentence in this case. And the people I think are generously. . . not insisting upon the high term, which I think is extraordinary because I don't really see that he doesn't deserve it quite frankly. And certainly the high term on the gun use." Defense counsel agreed the gun-use enhancement was "the issue." The court declared, "Well I have every intention of sentencing him to the high term because he previously has served prison terms. He committed an offense that really was substantially more serious than that for which he was convicted. And has received a tremendous series of breaks throughout the course of

things as a result of that. I mean this could be a life sentence and well should be. [¶] So I don't think there's much that he can say in the way of compelling argument to justify less than the high term on the gun use allegation."

The court then pronounced and explained its sentence as follows:

"Certainly probation is denied. And as to count 1, the defendant is sentenced to the mid bas[e] term of three years. And the court finds that [*sic*] the following factors in aggravation that are set forth in the probation officer's report:

"Number one, the crime involved quite violence [*sic*], great bodily harm, threat of great bodily harm or other acts disclosing a high degree of cruelty, viciousness and callousness.

"Number two, the defendant was armed with or used a weapon at the time of the commission of the crime.

"Number three, the defendant has engaged in a pattern of violent conduct which indicates a serious danger to society.

"Number four, the defendant's prior convictions as an adult or adjudications of commissions of crimes as a juvenile are numerous or of increasing seriousness. And certainly the latter portion of that applies here.

"Number five, the defendant has served prior prison terms.

"Number six, the defendant was on parole when he committed the crime.

"As a factor or circumstance in mitigation it is set forth that the defendant's prior performance on parole was good. And I think that's questionable. I think arguably there are no factors in mitigation here. However, the court will concede that issue . . . certainly in view of the fact that the people are not requesting the high term in this case. So again the mid base term of three years.

"And the court also imposes a consecutive high term of 10 years on the 12022.5 allegation, plus an additional term of three years on the 12022.7 allegation for a total of 16 years as to count 1."

The court imposed and stayed the sentence for count 2—the assault with a firearm conviction—pursuant to section 654. After the court determined appellant's credits and imposed various fines, assessments, and orders, it said, "And I think that's it." The prosecutor asked, "And your honor, what about the priors?" The court asked the prosecutor whether she was asking the court to add another year to the term, and the prosecutor agreed she was. Defense counsel responded, "I request that the court not, especially -- well the court has already given high term on the gun. My request is no high term given the *Cunningham*[**2**] argument as well which is incorporated in my memorandum. There's plenty of time to work with already and he had [*sic*] is still coming out arguably a third striker." The court imposed the one-year prior prison term enhancement.**3**

Appellant contends that his trial attorney rendered ineffective assistance by failing to object to the imposition of the prior prison term enhancement on the ground the court had already relied upon his service of a prior prison term to impose an aggravated term for the gun-use enhancement.

A claim that counsel was ineffective requires a showing, by a preponderance of the evidence, that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. (*In re Jones* (1996) 13 Cal.4th 552, 561.) Appellant must overcome presumptions that counsel was effective and that the challenged action might be considered sound trial strategy. (*Ibid*.) In order to prevail on an ineffective assistance of counsel claim on appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission. (*People v. Majors* (1998) 18 Cal.4th 385, 403.) Deciding whether to object or to make a particular argument, motion, or request is inherently tactical, and counsel's

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2 *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856].

failure to do so will seldom constitute defective performance. (*People v. Samayoa* (1997) 15 Cal.4th 795, 848; *People v. Kelly* (1992) 1 Cal.4th 495, 540; *People v. Price* (1991) 1 Cal.4th 324, 387.)

Appellant has neither made the required showing of prejudice nor overcome the presumption that counsel's failure to argue dual use was a sound strategic decision to refrain from making an argument he reasonably believed would be readily rejected. A review of the entirety of the trial court's observations and explanations at the sentencing hearing unequivocally reveals the court's view that appellant deserved a lengthy aggregate term based upon numerous aggravating factors, not simply his service of prior prison terms. Appellant has failed to show a reasonable probability the court would have stricken the prior prison term enhancement if defense counsel had objected on the basis of dual use. It instead appears probable the court would have revised its previously recited list of aggravating factors to omit the service of prior prison terms. Doing so would have left the court with two unquestionably valid, available aggravating factors to support imposition of the upper term on the gun use enhancement: appellant was on parole when he committed the crime and his convictions were of increasing seriousness. Defense counsel undoubtedly knew this, and may have therefore decided the better strategy was to argue that the term was lengthy enough without adding another year. This argument may reasonably have appeared to defense counsel to have some chance of success, given that the court seemed satisfied with the 16-year term it had imposed before the prosecutor reminded the court of "the priors." Accordingly, appellant has failed to establish ineffective assistance of counsel.

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3 The trial court unnecessarily, but harmlessly, struck "the prior as to" appellant's 2005 conviction.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TUCKER, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

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* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.